(15)

No. 91-1326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE DISTRICT OF COLUMBIA and
SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act pre-empts the District of Columbia's Equity Amendment Act.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of respondent, the Greater Washington Board of Trade.[1] The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 200,000 businesses and organizations and serves as the principal

[1] Both petitioner and respondent have consented to the Chamber's filing of this brief. The parties' consent letters are being filed simultaneously with this brief.

voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. *E.g., Ingersoll-Rand Co.* v. *McClendon*, —— U.S. ——, 111 S. Ct. 478 (1990), *FMC Corp.* v. *Holliday*, —— U.S. ——, 111 S. Ct. 403 (1990), and *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988).

The Chamber's members have a vital interest in preserving the uniform and exclusive federal regulation of pension plans intended by Congress when it passed the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001 *et seq.* ("ERISA"). The question presented in this matter—whether ERISA pre-empts the District of Columbia's Equity Amendment Act—is of great concern to Chamber members. The D.C. Act expressly cross-references workers' compensation benefits to the benefits provided under the employer's ERISA-covered plan. In doing so, the D.C. Act not only creates a threat of indirect state regulation of ERISA-covered plans, but also creates a substantial disincentive to the establishment and improvement of ERISA-covered plans. Thus, Chamber members have a fundamental interest in ensuring that the decision of the appellate court is affirmed, and the express pre-emption provisions of ERISA are preserved.

SUMMARY OF THE CASE

This case centers on the interplay between the District of Columbia Workers' Compensation Equity Amendment Act ("the D.C. Act") and the Employee Retirement Income Security Act of 1974 ("ERISA"). Section 514(a) of ERISA provides that "the provisions of [ERISA]

supersede any and all State laws insofar as they may now or hereafter *relate to* any *employee benefit plan* described in § 1003(a) of this title and not exempt under § 1003(b) of this title." 29 U.S.C. § 1144(a) (emphasis added). Section 1003(a) of ERISA sets out an expansive definition of an employee benefit plan "covered" by the statute. 29 U.S.C. 1003(a). Exempt plans are defined in § 1003(b) of the statute and include plans "maintained solely for the purpose of complying with applicable workmen's compensation laws . . ." 29 U.S.C. § 1003 (b)(3).

The Equity Amendment Act became effective on March 6, 1991 and amends the District of Columbia Workers' Compensation Act, D.C. Code § 36-301 *et seq.* to provide the following:

> (a-1)(1) Any employer who provides health insurance coverage for an employee shall provide health insurance coverage *equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this act.*
>
> (3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the *same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits* (emphasis added).

Respondent, the Greater Washington Board of Trade, challenged the Act in the U.S. District Court for the District of Columbia on the grounds it was pre-empted by § 514(a) of ERISA. The District Court rejected the Board of Trade's pre-emption argument. The court held that even though the Act "related to" an ERISA plan, the law escaped pre-emption because it fell within ERISA's § 1003(b)(3) exemption for state workers' compensation laws.

On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed. According to the court, the Act "relates

to" two plans—an ERISA covered health plan, and an ERISA exempt workers' compensation plan. The court reasoned that since the Act *links* the benefits provided under these two plans, it is pre-empted. The court noted that had the Act related only to an ERISA exempt workers' compensation plan, the law would have escaped pre-emption. Here, however, the ERISA covered health plan was so closely tied to the workers' compensation payments as to demand pre-emption.

ARGUMENT

This brief focuses on the single issue pressed most forcefully by petitioner and their *amici*: whether the Equity Amendment Act "relates to" ERISA-covered plans sufficiently to trigger pre-emption under § 514 of ERISA. There is no dispute among the parties that the D.C. Act relates to workers' compensation plans, which are exempt from ERISA coverage. That relationship does not trigger pre-emption. The key question is whether, in addition to relating to exempt workers' compensation plans, the D.C. Act also relates to plans covered by ERISA.

If the Court finds that the D.C. Act relates to ERISA-covered plans, the final question is whether the D.C. Act is saved from pre-emption by the fact that it also relates to exempt plans.

I. THE D.C. ACT "RELATES TO" ERISA-COVERED PLANS.

This Court has established the criterion for "relating to" an ERISA-covered plan—whether the state law has "a connection with or reference to" an ERISA-covered plan. The Chamber believes that this criterion is satisfied by the fact that the D.C. Act expressly cross-references workers' compensation benefits to the benefits provided under the employer's ERISA-covered plan.

In an attempt to avoid this Court's prior holdings, petitioners and their *amici* argue that, while there is a relationship, it is too "tenuous, remote, or peripheral" to trigger ERISA pre-emption. On the contrary, the Chamber believes that the relationship goes to the heart of employee benefit plans and, if the D.C. Act were allowed to stand, states could easily regulate the content and administration of ERISA-covered plans in contravention of ERISA.

A. The D.C. Act "Relates To" ERISA-Covered Plans By Explicitly Basing Workers' Compensation Benefits On The Benefits Provided By the Employer's ERISA-Covered Plan.

The Equity Amendment Act must be pre-empted, and the decision below affirmed, because the Act conflicts with ERISA's unequivocal pre-emption provision—a provision included in the statute by Congress to provide for federal regulation of private employee benefit plans.[2] The heart of all ERISA pre-emption analysis lies in the language of the statute itself. This case turns on the relationship between ERISA's express pre-emption provision *and* the distinction between an ERISA "covered" plan and an ERISA "exempt" plan.

The structure of ERISA shows this logical order:

—First, section 3 of ERISA defines "employee welfare benefit plan" and "employee pension benefit plan," in

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[2] " 'The question of whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone.' [Citations omitted]. 'To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute.' " [Citations omitted]. *Gade, Director, Illinois Environmental Protection Agency v. National Solid Wastes Management Association*, No. 90-1676, slip. op., at 6 (U.S. June 18, 1992). This Court has repeatedly recognized that ERISA's broad express pre-emption provision was designed by Congress to ensure that federal laws govern employee benefit plans. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). The breadth of this pre-emption provision was most recently recognized by this Court in *Morales* v. *Trans World Airlines*, 60 U.S.L.W. 4444 (U.S. June 1, 1992).

both cases based on the type of benefits provided, and collectively refers to them as "employee benefit plans."

—Next, section 4(a) of ERISA provides that ERISA covers all "employee benefit plans" established or maintained by an employer engaged in commerce or any industry or activity affecting commerce (or by a union).

—Then, section 4(b) provides five enumerated exceptions to ERISA coverage, among which is the exception for plans maintained solely to comply with state workers' compensation laws.

—Finally, section 514(a) pre-empts any and all state laws insofar as they relate to employee benefit plans that are covered according to section 4(a) and not exempted by section 4(b). Thus, section 514(a) pre-empts any and all state laws insofar as they relate to ERISA-covered plans but does not pre-empt state laws insofar as they relate only to plans that are exempt from ERISA.

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with* or *reference to* such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (emphasis added). In *Shaw*, the Court recognized the broad sweep of the § 514(a) pre-emption clause, and struck down a New York state law forbidding discrimination in employee benefit plans on the basis of pregnancy. To support its finding, the Court relied on the legislative history of ERISA which evidenced Congressional intent for the federal regulation of employee benefit plans. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 383 (1974); S. Conf. Rep. No. 1090, 93d Cong., 2d Sess. 383 (1974).

Although *Shaw* noted that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan," this Court has been unwilling to find the connection "tenuous" when the state law "refers"

to an ERISA plan. *Mackey* v. *Lanier*, 486 U.S. 825 (1988). In *Mackey*, the Court held pre-empted a portion of a Georgia garnishment statute on the grounds that the statute expressly referred to—or singled out—an ERISA plan. The Court noted that "[o]n several occasions since our decision in *Shaw*, we have reaffirmed this rule, concluding that state laws which make 'reference to' ERISA plans are laws that 'relate to' those plans within the meaning of § 514(a)." 486 U.S. 825, 829, quoting *Pilot Life Ins.* v. *Dedeaux*, 481 U.S. 41 (1987).

Furthermore, in *Ingersoll-Rand Co.* v. *McClendon*, —— U.S. ——, 111 S. Ct. 478, 483 (1990), this Court held that "a state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the *effect is only indirect*." (emphasis added). The Court ruled that a Texas state wrongful discharge action for interference with the attainment of pension benefits was pre-empted by ERISA because the action was premised on the existence of an ERISA plan. Thus, this Court recognized that state laws which are *premised on* or *make reference* to ERISA covered plans, "relate to" ERISA plans.

The D.C. Act does not have a "tenuous" relationship to an ERISA plan, but is in fact "premised on" the ERISA-covered health benefits plan an employer offers to its employees. The law falls squarely within the definition of "relates to" uniformly adhered to by this Court right up through *Ingersoll-Rand*. Under the D.C. scheme, employers who sponsor ERISA benefit plans for their active employees must provide equivalent benefits to employees eligible to receive workers' compensation.

In this respect, the D.C. law resembles a classic tying arrangement in antitrust. Just as a buyer is forced to buy article A (an otherwise undesirable product) if he wants to buy article B (the desirable product), the D.C. Act forces the employer to provide benefits in its workers' compensation plan if the employer wants to provide those benefits in its ERISA-covered plan. Just as a tying ar-

rangement relates to both of the tied articles, the law at issue in this case relates to both the covered and exempt plans.

B. The Relationship Of The D.C. Act To ERISA-Covered Plans Is Not Remote But Vitally Affects The Content And Administration of Such Plans.

Petitioners and their *amici*, faced with an obvious facial relation between the D.C. Act and ERISA-covered plans, retreat to arguing that the relationship is "tenuous, remote, or peripheral." They argue that the D.C. Act does not require the terms and conditions of the ERISA-covered plan to be altered, nor does it alter the administration and operation of ERISA-covered plans.

Of course, nothing in ERISA or this Court's previous decisions requires that a state law affect the terms and conditions or the operation and administration of ERISA-covered plans in order to trigger pre-emption. In the statute, Congress required nothing more than a finding that the state law "relate[s] to" an ERISA-covered plan. In its prior decisions, this Court has applied the words of the statute in accordance with their inherent breadth, holding all state laws pre-empted that had "a connection with or reference to" ERISA-covered plans, as just described. Indeed, as recently as 1990, this Court held pre-empted a state law that did not affect the terms and conditions or operation and administration of any ERISA-covered plan any more than the D.C. Act in this case does. *Ingersoll-Rand* v. *McClendon*, —— U.S. ——, 111 S. Ct. 478 (1990).

In *Ingersoll-Rand*, the Court faced the same entreaties as in this case to adopt a new judicially-created standard for ERISA pre-emption, *i.e.*, whether the state law affects the terms and conditions or administration and operation of ERISA-covered plans, but properly turned those entreaties aside. Besides the fact that it was explicitly rejected in *Ingersoll-Rand*, the poverty of this argument

by petitioners and their *amici* is eloquently revealed by the fact that *amicus* AFL-CIO cannot even make the argument without first spending 14 pages explaining that the "real" reason for every prior ERISA pre-emption decision of this Court was something different from what the opinion says. *Brief Of The American Federation of Labor And Congress Of Industrial Organizations As Amicus Curiae In Support of Petitioners* at 12-26.[3]

What the state law in *Ingersoll-Rand* and the D.C. Act have in common, besides relating on their face to ERISA-covered plans, is their substantial indirect effect on ERISA-covered plans. The Texas common law cause of

[3] Tellingly, the revisionist history of *amicus* AFL-CIO drives it to assert that *Ingersoll-Rand* was wrong and to re-argue a claim that this Court expressly rejected in *Ingersoll-Rand*, namely, the claim that section 514(c)(2) of ERISA shows that pre-emption applies only to a state law that "purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title." *Brief Of The American Federation Of Labor And Congress Of Industrial Organizations As Amicus Curiae In Support of Petitioners* at 24 n.16.

Not only did this Court expressly reject that argument, it did so on the solid ground set forth in the reply brief of *Ingersoll-Rand* (Reply Brief for the Petitioner in *Ingersoll-Rand* at 4-6), as follows: (i) "State" is defined in section 3(10) of ERISA, and Congress was content with pre-empting "State" laws insofar as they relate to employee benefit plans, but (ii) Congress also wanted to reach certain actions of state professional associations (such as bar associations) but realized that the "relate to" standard would be far too broad if the definition of "State" were merely expanded to such instrumentalities, so (iii) for the purpose of pre-emption only, in section 514(c)(2) Congress added instrumentalities to the ordinary definition of "State" but only those instrumentalities which purported to regulate the terms and conditions of plans.

Contrary to the assertion of *amicus* AFL-CIO, therefore, the last eighteen words of section 514(c)(2) serve a vital purpose. And, far from supporting petitioners, they only confirm Congress's understanding that the phrase "relate to" encompasses far more than regulation of the terms and conditions of plans. *Ingersoll-Rand* simply does not suffer from the illness for which *amicus* AFL-CIO prescribes radical reinterpretation as the cure.

action for wrongful discharge in *Ingersoll-Rand* would have created a powerful disincentive to the establishment and maintenance of ERISA-covered plans by subjecting employers to lawsuits, including extracontractual damages, solely because they maintained such plans.

The D.C. Act harbors an even more immediate disincentive to the establishment or improvement of ERISA-covered plans. Whereas an employer that does not offer an ERISA-covered plan need only provide the minimum level of health care directly mandated by the workers' compensation law, an employer that establishes an ERISA-covered plan will be required to upgrade its workers' compensation plan to achieve parity. If the additional cost of improving the workers' compensation plan is more than the employer can bear, then the D.C. law will have prevented the establishment of an ERISA-covered plan, in contravention of the express purpose of ERISA to foster the development of employee benefit plans, by imposing a cost that Congress chose not to impose in ERISA.

The same analysis applies to any improvement in an ERISA-covered plan. An employer that desires to offer a benefit in its ERISA-covered health plan—and under ERISA alone would be free to do so—cannot do so in the District of Columbia unless it also offers the same benefit in its workers' compensation plan. By tying the workers' compensation plan to the ERISA-covered plan, the D.C. Act imposes a substantial burden on the establishment and improvement of ERISA-covered plans.[4]

[4] Petitioners may argue that the tying arrangement is desirable in order to promote a high level of benefits in workers' compensation plans. But that is like the perpetrator of an illegal tying arrangement arguing that the arrangement is desirable for getting rid of the unpopular article. Whatever virtue there may be in promoting a high level of benefits in workers' compensation programs, Congress has declared that petitioners may not do so by correlatively burdening the establishment and improvement of ERISA-covered plans.

The substantial burden of the D.C. Act can be seen even more clearly by magnifying the law. If the D.C. Act, rather than requiring parity, required the workers' compensation plan to provide benefits twice as good—or three times as good—as the benefits under the ERISA-covered plan (like a tying arrangement forcing the buyer to buy article A at twice its market value if he wants to buy article B),[5] the chilling effect on establishment or improvement of ERISA-covered plans would be substantial and serious.

The D.C. Act is analytically no different from a workers' compensation tax measured by the level of benefits in the employer's ERISA-covered plan. After all, workers' compensation acts need not permit private insurance; they may operate as state-administered funds supported by taxes on employers.[6] If the District of Columbia had such a system, the economic reality would be clear that the state was taxing the employer on the content of its ERISA-covered plan.

As the lower courts have held, however, there is no doubt that a state tax based on the content of the employer's ERISA-covered plan is pre-empted. *E-Systems, Inc.* v. *Pogue*, 929 F.2d 1100 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 585 (1991). Such a state tax has an obvious "connection with or reference to" the ERISA-covered plan. More ominously, however, since the power to tax involves the power to destroy, such a state law would effectively allow the state to determine the content of ERISA-covered plans. Because this case is analytically identical to a tax, it is clear that the relation is not remote but immediate and substantial.

[5] For example, if the ERISA-covered plan had a deductible of $100, the D.C. Act could cap the deductible under the workers' compensation plan at half that amount. If the ERISA-covered plan had a lifetime maximum of $100,000, the D.C. Act could require the workers' compensation plan to provide double that amount.

[6] W.R. Dittmar, *State Workmen's Compensation Laws* (1950).

If the Court adopted the view of petitioners and their *amici* that a "mere" tying arrangement does not constitute a substantial enough relation to trigger ERISA pre-emption, an enormous loophole would be opened in ERISA pre-emption. For example, the state workers' compensation law could require that the administrator of the workers' compensation plan be the same person as the administrator of the ERISA-covered health plan. In the view of petitioners and their *amici*, such a workers' compensation law would not "relate to" the ERISA-covered plan. But if the existing administrator of the ERISA-covered plan did not offer the service of administering workers' compensation plans, such a law would effectively force the ERISA-covered plan to change administrators.

Or suppose that a state were unhappy with the fact that employers were self-insuring and thus depriving the state of the premium taxes that it used to collect when the ERISA-covered plans purchased insurance. *See E-Systems, Inc.* v. *Pogue*, 929 F.2d 1100 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 585 (1991). If a "mere" tying arrangement escaped ERISA pre-emption, what would prevent the state from enacting a workers' compensation law that required workers' compensation benefits at an extremely high level for those employers whose ERISA-covered plans were self-insured but at a much lower level for those whose plans were insured?

The tying arrangement in this case is qualitatively different from the analogy thrown up by *amicus* AFL-CIO regarding "make whole" remedies for wrongful discharge under state law.[7] For example:

[7] The AFL-CIO argues that the D.C. Act is no different from a "make whole" remedy for wrongful discharge under state law, since such a state-law remedy requires the employer to pay money measured by the benefits provided in the employer's ERISA-covered plan. Since state tort law is not pre-empted in that regard by ERISA, the AFL-CIO reasons, neither is the D.C. Act. *Brief Of The American Federation Of Labor And Congress Of Industrial Organizations As Amicus Curiae In Support Of Petitioners* at 29-30.

—A "make whole" remedy under state law need not make any mention of an ERISA-covered plan; it need only provide for the employee to be made whole for any and all losses. By contrast, the tying arrangement in this case, in order to work at all, must make particular, specific cross-reference to the employer's ERISA-covered plan.

—A "make whole" remedy is analytically the same as (and merely an economic substitute for) returning the employee to work and restoring his employment history as if the wrongful act had not occurred. If the employee were actually returned to work and his employment history restored, the consequences under the employer's ERISA-covered plans would flow automatically, without any reference to the plans. No one could seriously contend that returning the employee to work "relates to" the plans so as to trigger pre-emption, but that is all the "make whole" remedy amounts to.

—The "make whole" remedy represents no more than the economic value of the benefits to which the employee would have been entitled had the wrongful discharge not occurred. Expressed another way, it merely prevents the employer from realizing a windfall savings due to the wrongful act. By contrast, the tying arrangement in this case uses the ERISA-covered plan as a point of reference to provide the employee with a separate, additional benefit not provided by the ERISA-covered plan.

—Since the "make whole" remedy represents nothing more than a fulfillment of the promise that the employer has already made in its ERISA-covered plan, the remedy creates neither incentives nor disincentives with regard to establishment or improvement of the ERISA-covered plan. By contrast, the tying arrangement in this case, by creating an additional liability separate and apart from the ERISA-covered plan, creates substantial disincentives to the establishment and improvement of ERISA-covered plans.

In any event, there is no need to sift and weigh the actual or potential effect on ERISA-covered plans. Congress employed blanket pre-emption in § 514 in order to avoid any balancing tests—to avoid "endless litigation over the validity of State action that might impinge on Federal regulation" (120 Cong. Rec. 29942 (1974), *reprinted in* 3 *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976) at 4770 (remarks of Sen Javits)).

II. WHERE A STATE LAW RELATES TO BOTH COVERED PLANS AND EXEMPT PLANS, IT IS STILL PRE-EMPTED INSOFAR AS IT RELATES TO COVERED PLANS.

We have conceded that the D.C. Act relates to workers' compensation plans, which are exempt from ERISA coverage. We have established that the D.C. Act also relates to health plans covered by ERISA. The final question is whether, and to what extent, a state law is pre-empted when it relates to both covered and exempt plans.

The language of ERISA provides the answer: ERISA § 514 pre-empts all state laws "insofar as they may now or hereafter relates to" any plan covered by ERISA. Thus, the state law is pre-empted insofar as it relates to covered plans but is free from pre-emption insofar as it relates only to plans that are exempt from ERISA coverage. In the present case, the D.C. Act must be pre-empted insofar as it ties workers' compensation benefits to the ERISA-covered plan; in all other respects it remains valid.

Petitioners urge a position that violates both the language and structure of ERISA. Petitioners argue that, because the law relates to exempt plans (which it does, in part), it is saved in its entirety from pre-emption (even including that part which relates to covered plans). The language of §514 precludes that argument in two ways:

1. Section 514 mandates pre-emption of laws that relate to covered plans. There is no exception for laws that also relate to exempt plans. If petitioners were right, it would be all too easy for a state to pass a law regulating ERISA-covered plans and then, to avoid pre-emption, to toss in a provision that regulates exempt plans, too.

2. Section 514 carefully mandates pre-emption only "insofar as" the law relates to covered plans demonstrating that pre-emption does not apply to the state law as a whole but only those parts which relate to covered plans.

The structure of ERISA also precludes petitioners' argument. Section 514 pre-empts all state laws insofar as they relate to covered plans. Section 4(b) provides that plans maintained solely to comply with state workers' compensation laws are not covered by ERISA. Thus, the workers' compensation exemption exempts *plans* from ERISA coverage; it does not exempt *state laws* from pre-emption.

Petitioners attempt to confuse the issue by referring to the situation where the employer uses its ERISA-covered plan to comply with state workers' compensation law. There is no reason for confusion. As this Court held in *Shaw*, state law may not regulate any portion of an ERISA-covered plan—even that portion which the employer maintains to comply with state workers' compensation law.* But nothing prevents a state from enacting a workers' compensation law that requires the workers' compensation program to be maintained as a separate plan, which would then be exempt from ERISA and beyond the reach of ERISA pre-emption.

While pre-emption is obvious where, as in *Shaw*, the employer folds the state-mandated benefits into its ERISA

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* ERISA section 4(b) exempts from ERISA coverage plans maintained solely to comply with state workers' compensation, unemployment insurance and disability insurance laws. A plan that provides benefits beyond those required by the state law is not maintained "solely" to comply with those laws and is therefore covered by ERISA. Thus, where an employer chooses to meet the minimum standards of a state workers' compensation law through its ERISA-covered plan, the entire plan is covered by ERISA.

covered plan, the analysis set forth in this brief does not depend on that configuration. On the contrary, our analysis has at all times assumed the harder case—that the workers' compensation plan is maintained separately from the ERISA-covered plan.

CONCLUSION

Even where the employer maintains its workers' compensation plan separate from its ERISA-covered plan, the D.C. Act is pre-empted because (1) on its face it relates to ERISA-covered plans by explicitly tying benefits under the workers' compensation plan to benefits under the ERISA-covered plan and (2) the relation is immediate and substantial, creating a strong disincentive to the establishment and improvement of ERISA-covered plans (contrary to the intent of Congress in ERISA) and posing a very real threat of indirect state regulation of ERISA-covered plans. Accordingly, the decision below should be affirmed.

Respectfully submitted,

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